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No. 82-834

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LYNN G. WALCK, On Behalf Of Himself And Representatively On Behalf Of Himself And Others Similarly Situated,

Petitioner,

v.

AMERICAN STOCK EXCHANGE, INC.

and

NEW YORK STOCK EXCHANGE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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In the Respondents' Brief In Opposition To The Petition For A Writ of Certiorari ("Respondents' brief"), the Exchanges raised two arguments which warrant comment, viz., that the §6[1] issue has limited applicability since a similar situation will not recur and that the Court of Appeals properly applied decisions of this Court, particularly Merrill Lynch, Pierce, Fenner & Smith v. Curran, --U.S.--, 102 S.Ct. 1825 (1982) ("Curran").[2]

1/ Securities Exchange Act of 1934, §6, 15 U.S.C. §78f (1970) and as amended, 15 U.S.C. §78f (1976).

2/ The speculation of the Exchanges concerning the "historical conflict" between the Circuits, reflected in their statement that "(they) question whether the Court of Appeals for the Second Circuit would not today, with the guidance of this Court's decision in Cort v. Ash and Redington, overrule Baird v. Franklin and follow the decision below" (Respondents' brief at 11), is selfserving, superfluous and

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[Footnote 2 continued on next page]

THE EXCHANGES HAVE MISINTERPRETED CURRAN

The Exchanges' creative reading of Curran is at odds with the holding of that case. Curran states in part that:

> When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts ... the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the preexisting remedy.

--U.S.--, 102 S.Ct. at 1839 (emphasis added). Whether or not the Exchanges wish to acknowledge it, the fact remains that

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[Footnote 2 continued]

> belied by the language contained in Lank v. New York Stock Exchange, 548 F.2d 61, 66-67 (2d Cir.1977), which language is ignored by the Exchanges. See also, Arneil v. Ramsey, 550 F.2d 775, 738 (2d Cir. 1977), and Leist v. Simplot, 638 F.2d 283, 296 n.1, 298 (2d Cir. 1980), aff'd subnom, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, --U.S.--, 102 S.Ct. 1825 (1982).

for 30 years prior to Cort v. Ash, 422 U.S. 66 (1975), lower federal courts recognized, acknowledged or assumed that public investors were entitled to sue a stock exchange pursuant to §6 for failure to enforce exchange rules. A finding in this case that an implied right of action exists will merely confirm that which had been decided long ago. It will also render more certain the continued recognition of an implied remedy under §6, as amended, in future cases.

Congress could have eliminated any question about the existence of an implied remedy by specifically stating that there was no such right. However, Congress chose not to include such a provision in the 1975 Amendments. By its action Congress affirmed the continued existence of a right which already existed. To decide otherwise is to ignore the rule of statutory construction quoted by this Court, that

> (W)here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Curran, --U.S.--, 102 S.Ct. at 1841.

A DETERMINATION OF THE SECTION 6 ISSUE IS RELEVANT

As to the argument concerning limited applicability of the §6 issue, a determination by this Court would have great and far-reaching effect, vis-a-vis the duty of a stock exchange to enforce its rules against broker dealers in favor of public investors. A decision by this Court recognizing a private remedy within the "self-regulatory scheme" contained in §6 would increase the effectiveness of the provision. The Exchanges state that a resolution by this Court "would not have immediate importance far beyond the particular facts and parties involved" (Respondents' brief at 5). Their concern is

understandable; they do not wish to be faced with the prospect of judicial review of their wrongful actions or omissions. This attempt by the Exchanges to forestall judicial review of their actions (or lack of action in the instant case) by raising a hypertechnical argument should not be permitted by this Court.

This Court, in Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973)(Blackmun, J.), noted under the earlier version of §6 that "(t)he Commission's direct authority with respect to exchange self-regulation is supervisory", and exists only with respect to certain designated subject areas. 414 U.S. at 129. However, the Court also noted that "the Commission has exercised its direct supervisory powers sparingly", 414 U.S. at 129-130, citing the Securities Industry Study, Report of the Subcommittee on Securities, Committee on Banking, Housing

and Urban Affairs, S.Doc.No. 93-13, p. 180 (1973). The SEC cannot be expected to monitor every single instance of wrongdoing by an exchange. Moreover, even when the SEC acts, it is extremely unlikely that the SEC would withdraw the registration of the AMEX or of the NYSE as was done in the case in San Francisco Mining Exchange v. SEC, 378 F.2d 162 (9th Cir. 1967), cited by the Exchanges.[3/] As this Court noted in Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963):

> Although the (Securities Exchange) Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules (citation omitted) and impliedly, therefore, to disapprove of any rules adopted by

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3/ In 1976, the NYSE had 80.03% of the total share volume and 84.35% of the total dollar volume of all securities transactions on registered exchanges in the United States. See, 43rd Annual Report of the SEC for the Fiscal Year Ended September 30, 1977, and the Transition Quarter - July 1, 1976-September 30, 1976, p. 311.

> an exchange (citation omitted), it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules.

This Court went on to say that "(s)ome form of review of exchange self-policing, whether by administrative agency or by the courts, is therefore not at all incompatible with the fulfillment of the aims of the Securities Exchange Act." 373 U.S. at 359 (emphasis added). Although Silver involved issues different from the issues involved here, one principle is still pertinent:

> Congress in effecting a scheme of sel-fregulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner.

373 U.S. at 364. Here too, the Exchanges cannot be permitted to hide under their umbrella of "self-regulation" after allowing the conduct of Edwards & Hanly to cause harm to so many public investors.

CONCLUSION

For the reasons set forth above and in the Petition For A Writ of Certiorari, it respectfully requested that the Petition be granted to review the opinion and judgment of the United States Court of Appeals for the Third Circuit. In the alternative, it is requested that this Court grant the Petition and remand this cause to the United States Court of Appeals for the Third Circuit, with directions to reconsider its holding in this cause, in light of this Court's decision in Curran.

Respectfully submitted,

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